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Book Review

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Judging Positivism by Margaret Martin*

The Scope of Martin's Book

This is a book, as the author explains in the introductory pages, that offers a case study on legal positivism rather than a comprehensive examination of the various approaches found under that banner. However, as the subject of the case study is Joseph Raz, the author feels able to draw out some general lessons on the credibility of legal positivism, and beyond that on the current condition of legal philosophy or jurisprudence. Margaret Martin's book accordingly provides stimulating material on three levels: an intricate study of the principal works of Joseph Raz; a challenging critique of legal positivism; and a thoughtful reflection on the potential of legal theory.

The seven chapters of the book include a chronological tour of four of Raz's books. Chapter 1 deals with *Practical Reason and Norms*, chapter 2 with *The Authority of Law*, chapter 3 with *Ethics in the Public Domain*, and chapter 4 with *The Morality of Freedom*. In addition, Martin refers to *Between Authority and Interpretation*, devoting specific attention in chapter 7 to Raz's response to Gerald Postema, which is republished as an appendix to that book. The intervening chapters, 5 and 6, are employed to advance Martin's critique of Raz on the one hand, and her vision for legal theory on the other hand, respectively focusing on the idea of law as a set of public practical reasons, and on law's contribution to preserving order in society. The one key work absent from Martin's survey is Raz's *Concept of a Legal System*. The possible significance of this absence will be commented on below.

At the heart of Martin's critique of positivism are the two charges of inconsistency and incoherence[1] she brings against Raz. Her basic strategy appears to be that if Raz's positivism can be shown to be irredeemably flawed, then no other versions can be taken seriously.[2] She does not consider it necessary to engage with other versions (vii-viii, 57), notably those labelled as inclusive legal positivism (3-4 n10).[3] Martin invokes Jules Coleman's admission that (his version

*Oxford: Hart, 2014, ISBN: 978-1-84946-099-6.

1. Inconsistency relates to inconsistent positions over time in Raz's different works (49) and also to vacillation between opposing positions within the same work (60, 93, 178). Incoherence relates to the incompatibility of different positions or theses Raz maintains at a particular time in his theorizing (26, 47, 60, 81). The second type of inconsistency may contribute to incoherence.
2. In the Preface Martin states, "I will argue that the non-normative 'conceptual' or 'descriptive' project rests on an extremely unstable foundation—the instability of which is best viewed from the inside of Raz's complex account." (viii).
3. Martin does engage with normative positivism briefly, when indicating that this would be the only resort available to Raz in order to maintain a positivist outlook in the face of problems with his sources thesis (8), but it is clear that she regards this as crossing the line into normative theories of law (57, 114-15), and thus requires a non-positivist theoretical outlook.

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of) inclusive legal positivism "occupies a logical space rather than 'a real world one'" (3 n10), an admission that might not be so readily forthcoming from the other exponents of inclusive legal positivism she mentions, Wil Waluchow and Matt Kramer.

What might seem to be a tangential quibble over the characterization of legal positivism assumes greater significance for Martin's work in two respects. First, she joins Hart to the indictment against Raz, particularly in chapter 6; yet Hart is widely regarded as having taken an inclusive positivist route. Secondly, and more fundamentally, Martin's attack on Raz takes the form of a rigorous analysis of the different premises (or theses) of his legal theory in pointing to their inconsistency and incoherence. The concern here is that if these premises are regarded as necessary for the paradigm of exclusive legal positivism, and the attack on the premises leads to a rejection of exclusive legal positivism; then, it does not follow that legal positivism as a whole should be rejected, but rather some effort must be made to consider whether an amendment to the premises might preserve the viability of a positivist theory. But an amendment to the premises of exclusive legal positivism is precisely how inclusive legal positivism emerges, so it must be considered seriously before positivism can be judged and rejected.

Martin Against Raz

Martin's argument against Raz takes the form of carefully unpicking the key positions adopted by Raz in his successive works, and then scrutinizing each position for its consistency with the other positions and its ability to contribute to the overall coherence of Raz's theory of law. Some of these positions are familiar as the "theses" Raz has himself drawn attention to; others are less familiar, and part of the value of Martin's work lies in bringing together a number of different positions that have been central to the development of Raz's theory of law. To adopt a consistent terminology, I shall refer to each of these central positions, or premises, of Raz's theorizing as a thesis, compatible with Raz's own use of that term for the more familiar positions. A consistent terminology is important here in that Martin's argument relies on these different positions all occupying the same level of axiomatic importance in Raz's theory of law, such that inconsistency or incoherence proves fatal. It follows that two defensive moves might be available to Raz: denying that one of these positions that Martin has identified amounts to an axiomatic thesis of his theory; or, denying that he has supported these theses concurrently—that is to say, that his theory of law has developed over the years by discarding or amending a thesis that he had previously held.

Martin is aware of the reasonableness of this latter defensive move but responds with the graver charge that the changes or developments in Raz's theory of law have led to incoherence. She recognizes that such an accusation will not be readily accepted, even among Raz's critics:

> Given the resistance that my argument will surely encounter from these defenders and critics alike, it is important to make readers aware of Raz's statements about the relationship between his various theses. (151)

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Fortified by a painstaking exposition of Raz's own texts, Martin does not shrink from bringing the accusation, and bringing it in an uncompromising manner.

The detailed work, as has been indicated, ranges over four of Raz's books and then culminates in the final chapter with a blow-by-blow, slow-motion rewind of his exchange with Postema. There is not the opportunity here to provide a full account of Martin's arguments. I shall select only a few examples for closer examination below. In general, Martin's arguments are crafted with care and produce a forceful challenge to the conventional reception of Raz's work. Avoiding the detail for the moment, the essence of her accusation can be portrayed quite simply, as follows. (A) In his earlier work, Raz combined a number of theses to provide a coherent theory of law. (B) However, his theory was clearly incapable of relating to the actual experience of the common law. (C) Since Raz's theory was methodologically driven by a philosophical approach which set out to identify the necessary features for all legal systems, his theory could not survive a common-law counter-example. (D) Raz then seeks to amend his theory to make allowance for the common law. (E) The proposed amendment proves unconvincing. (F) Raz then makes a radical shift in his theory by dropping some of the theses that were found in his original theory and adding additional theses that are incompatible with the dropped theses. (G) However, these new theses do not sit comfortably with the remaining thesis from his original theory, which actually requires the discarded theses in order to remain viable. (H) Moreover, Raz has by introducing his new theses made a methodological shift from an analytical philosophical approach to a focal or ideal case approach.

Martin's charge of incoherence against Raz bites at (G). Her broader ambition to reject positivism in favour of normative legal theory gets its big push at (H), since the focal or ideal case approach necessitates moral evaluation or normative argument (75-76, 90-91), bringing us "to the doorstep of the natural lawyer" (148). More on Martin's broader ambition subsequently. First, some detail on her accusation against Raz.

Ignoring Raz's unsuccessful intervention at (D),[4] the sets of theses Martin identifies at (A) and (F) comprise:

(1) judicial duty thesis (to apply the law) (18-23)
(2) strong autonomy thesis (of law and of legal reasoning) (21)
(3) sources thesis (29)
(4) strong limited domain thesis (identification and application of law) (161)
(5) pre-emption thesis (49)
(6) certainty thesis (96, 102)
(7) weak autonomy thesis (of law but not of legal reasoning) (58, 108)
(8) ideal sources thesis (109, 171)
(9) weak limited domain thesis (identification but not application of law) (161)

4. This involves recasting in *The Authority of Law* his initial portrayal of law so as to permit a rule plus exception model of adjudication (33-43).

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(10) normal justification thesis (76)
(11) dependence thesis (76)
(12) claim to authority thesis (62)

In brief, the early theory at (A) is constituted by theses (1)-(6); then (1) is dropped, (2) is replaced by (7), (3) is replaced by (8), (4) is replaced by (9), (5) is retained but accompanied by (10) and (11), (6) is dropped and (12) is added. That leaves (5) plus (7)-(12) at (F). So, in effect, only the pre-emption thesis survives intact from Raz's initial set of theses.

The insurmountable problem for Raz, as Martin sees it, is that the pre-emption thesis requires the other five theses at (A) in order to be viable, and is incompatible with the alternative six theses it is grouped with at (F). The incompatibility is in part linked to the change in methodology Martin has identified in (H). So, for example, the pre-emption thesis requires an analytical not ideal sources thesis (111, 115). In Raz's treatment of authority, Martin identifies a head-on collision between the pre-emption thesis and the additional authority theses (normal justification and dependence) found in Raz's later work:

> The tension between the pre-emption thesis and the normal justification thesis is apparent when one bears in mind that for Raz, only morally legitimate legal norms have pre-emptive force. … Consequently, the *very act of determining whether the norm meets the normal justification standard undermines the pre-emptive force of the norm(s) in question.* (77) [original italics]

At times, Martin's understanding of Raz attributes a position to Raz despite his avowed denial of it. This occurs notably with the certainty thesis, which Raz clearly disowns in his exchange with Postema (168-69). On such occasions, Martin is careful to acknowledge Raz's dissent and concerned to provide further argument in rebuttal of it. The reader must decide who gets the better of these divergent constructions of Raz's positions. It might be thought Martin is at an extreme disadvantage here. However, as Raz is not simply speaking *ex cathedra* to provide his theoretical views, but rather commenting on the back of a considerable body of established theoretical work, Martin does have access to material on which to join issue.

Irrespective of the perceived outcome of particular skirmishes between Martin and Raz, Martin does have a potentially more devastating weapon in her armoury. She complains that Raz adopts a general tactic of defending a particular thesis as though it could be isolated from its place within his complete theory of law (vii, 49, 69). In the context of his exchange with Postema, she writes:

> Only if Raz's theses are defended in isolation from each other does his series of deflections make sense. Once they are combined into a single theoretical account, Postema's charges find their target. (168)

Martin's personal conclusion is that the theses she has identified Raz with at different stages of his theory of law are incapable of being brought together in a coherent whole:

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> Raz cannot simply deflect criticism. He must show how the pieces of his conceptual puzzle fit together. In my view this is a futile undertaking. (179-80)

Assessing Martin's Project

The success of Martin's project can be assessed with respect to the three levels of her book mentioned in the opening paragraph—her study of Raz, her critique of legal positivism, and her reflection on the potential of legal theory. From her study of Raz, Martin has raised a clear and compelling challenge. In order for Raz's theory of law to be understood and evaluated, there is a need to identify the theses his theory currently embraces and to demonstrate their mutual coherence. As was seen in the previous section, Martin herself has undertaken much of the work required for this enterprise. The opportunity for refining this work is presented in terms of engagement (either supportive or critical) with the theses (1)-(12) recognized by Martin, and with her understanding of their interrelationship at different stages in the development of Raz's theory of law.

As for Martin's conclusory dismissal of the prospect of retrieving a set of theses that would provide coherence to Raz's theory of law, this may be premature. Very briefly, I shall mention two directions in which a Razian approach could be taken, even if it is accepted that Martin's criticisms of the current state of Raz's theory are well-founded. The one direction relates to a central theme of her criticism over Raz's failure to account for the judicial role within a positivist approach, that the exclusionary feature of law (18) cannot be maintained if the judiciary remains free to determine the law by reference to extra-legal, evaluative factors. In pressing this criticism, Martin variously accuses Raz of having to exchange his exclusive positivism for normative positivism (115), Dworkinian interpretivism (41), or American legal realism (55). Be that as it may on the depiction of judicial activity, there nevertheless remains a further opening for a form of legal exclusionism. This ties into the principal subject matter of the missing book, a legal system. Within the wider workings of a legal system, containing not only the legal norms that direct behavior but also the legal norms that identify the officials and the settings in which authoritative determinations of what the law requires can be made, there is the prospect for what we might refer to as "staggered exclusionism". If not immediate exclusion of extra-legal, evaluative factors through the comprehension of clearly applicable, existing legal norms, then eventual exclusion of extra-legal, evaluative factors once the authoritative determination of the applicable legal norm has been made in a way that the law (the legal system) provides.[5]

The second potential direction for a Razian approach does involve countering an argument made by Martin, not one of the criticisms against Raz that have been surveyed above but an additional implication she draws from those criticisms.

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5. This suggestion goes beyond an argument raised by Raz and discussed by Martin (24-25) that the possibility of exercising judicial discretion might be determined by the law, as a means of stabilizing the distinction between clear law and judicial discretion. No such stable distinction is required here.

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It involves rejecting her exposition of a theoretical standpoint she attributes to Raz in the earlier stage of his theory. The point at issue here has broader significance. It ties into Martin's peremptory dismissal of the prospect for a reworking of Razian theses into a coherent theory. It also spills over into her rejection of positivism, and is implicated in her view of the potential for legal theory. Martin takes the early stage of Raz's theory equated with theses (1)-(6) to revolve around an acceptance that the law plays a crucial role in bringing about social order (18-21, 32). In the exchange with Postema where Postema proposes recognising a role for law in promoting social cooperation, Martin argues that Raz's denial of Postema's claim is inconsistent with Raz's own stated theoretical position (162-64). However, in doing this Martin is treating social order and social cooperation as equivalents. But they are not, and this is clear from specific passages of Raz and Martin found in the book.

The crucial distinction turns on whether the social existence in question is founded on an imposed order irrespective of the dissonant interests of individual members of society or emerges as a harmonious order serving the common interests of members of society. On Raz's part, it is clear that he is contemplating an imposed order on dissonant interests. In a passage excerpted by Martin (32), Raz stresses that the legal view is "a view binding on all members notwithstanding their disagreement with it."[6] On the other hand, Martin speaks of "the role that shared values play in allowing law to guide conduct" (117); she considers "[legal] decisions track common understandings of what is fair" (133). Although Gerald Postema recognizes, in a passage quoted by Martin twice (2, 152), that members of society on their own were subject to "the jarring dissonance of social life" and individually were likely to express "dissonant judgments", he nevertheless regards the law as "unify[ing] the judgment of the people, to enable them to speak the language of justice to each other in a single voice"[7]—thus placing his social cooperation under law firmly on the side of a harmonious order based on common values.

The fact of the matter is that law is capable of both imposing order on dissonant interests or values and expressing a harmonious order serving common interests or values. Martin herself provides an illustration of the former possibility when she endorses Raz's example of the law serving the interests of pharmaceutical companies as opposed to the interests of consumers (87-88). Accordingly, if Raz in his earlier work regarded social cooperation through law as imposed order on dissonant interests and Postema considers that social cooperation through law is a matter of harmonious order with the discovery of common interests, then it remains open for Raz to reject Postema's position on the role of law in promoting social cooperation, without any inconsistency regarding his own (previous) position.

The importance of tidying up this matter extends beyond a defence of Raz on a particular point. The significance of the crucial distinction made above lies in its providing a third possibility to oppose the dichotomy offered by Martin

6. Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 51.
7. Gerald Postema, "Law's Autonomy and Public Practical Reason" in R George, ed, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) at 79.

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for the path of legal theory. Martin's dichotomy consists in either legal positivism or normative legal theory grounded in the pursuit of the common values of society. It is this false dichotomy that leads her (having rejected positivism) to "the doorstep" of natural law, as we noted above. A third way is now apparent, encompassing the requirement for law to produce social order without embracing a common, i.e., uniform, set of values such as those natural law holds itself out as ready to provide—as, indeed, does Dworkin.

In relation to providing a potential direction for a reconstituted Razian approach, the pertinent factor is that this third way relies on the law to express an authoritative ordering of society quite separately from any assumption of a set of common values existing to provide the basis for social cooperation. This feature of law is clearly served by some of the theses of Raz considered above. How these theses might be arranged in a coherent theory of law is a matter for speculation, but such speculation is far from futile. Particularly, if the notion of staggered exclusionism is also introduced into the process of reconstitution.

In relation to Martin's rejection of legal positivism, the emergence of this third way means that she cannot simply oppose one model of positivism with the possibility of normative legal theory *and at the same time* identify that normative legal theory with a theory such as natural law that identifies the normative aspect with a set of common social values. I indicated in the introductory section that Martin was too quick to dismiss inclusive positivism. Whatever form inclusive positivism might take, there remains room for it (or some other brand of positivism) to meet the requirements of a normative legal theory that does not depend on a set of extra-legal common values.

In relation to Martin's view of the potential of legal theory, the rejection of her dichotomy does leave legal theory in a more expansive state than she herself permits. However, it would be misleading to conclude on this negative point. Throughout her book Martin displays a commitment to enlarging the vision of legal theory. The contributions she has made within the book to this goal are considerable. She has offered a particular incentive to engage with Raz's theory of law in a new light. More widely, she has insisted on connecting the theses of legal theorists to a complete theory of law. From this insistence, two particular benefits flow. One is enunciated as a pervasive theme in her discussion of Raz: the importance of tying together a position on legal reasoning with a position on the nature of law within any plausible theory of law. The other benefit, which is inevitably bound up with the first, although receiving less prominent attention is equally stressed by Martin: the recognition of the relationship theory must enjoy with practice (45, 122-23, 132, 141, 145, 162)—if it is to be credible and of value.

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